

The enterprise zone building materials exemption allows retailers located in the municipality or unincorporated area of a county that established an enterprise zone to make tax-free sales of building materials that will be incorporated into real estate located in the enterprise zone. See 86 Ill. Adm. Code 130.1951. (This is a PLR).

November 3, 2000

Dear Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (see <http://www.revenue.state.il.us/legalinformation/regs/part1200>), is in response to your letter of September 25, 2000. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of the enclosed copy of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither COMPANY nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter, you have stated and made inquiry as follows:

On behalf of our client, COMPANY, we respectfully request the Illinois Department of Revenue issue a Private Letter Ruling pursuant to 2 Ill. Adm. Code Section 1200.110 with respect to the following factual situation.

General Information

1. Enclosed please find an original Form IL-2848 Power of Attorney, authorizing BUSINESS to represent COMPANY (the 'Company') before the Illinois Department of Revenue (the 'Department').
2. This Private Letter Ruling ('PLR') is not requested with regard to hypothetical or alternative proposed transactions. The PLR is requested to determine the Retailer's Occupation Tax and Use Tax consequences of the actual business practices of the Company.
3. The Company is not currently engaged in litigation with the Department in regard to this or any other tax matter.
4. The Company is not currently under audit by the Department in regard to any tax matter.
5. To the best knowledge of the Company's personnel, the Department has not previously ruled regarding this matter for the Company. In addition, the Company has not submitted the same or similar issue to the Department.

6. The Company requests that certain information be deleted from the PLR prior to dissemination to others. The Company requests that its name, address, location of its facility and the name of its representative be deleted.
7. The Company knows of no authority contrary to the authorities referred to and cited below.

Statement of Material Fact

1. The Company is engaged in the operation of an electricity generating facility.
2. The Company has constructed a 300 megawatt natural gas fired simple-cycle electricity generating facility (hereafter referred to as the 'facility') in CITY, Illinois.
3. The facility is located within the CITY Enterprise Zone.
4. The Company has purchased the significant materials (see below) required for the facility and contracted with a contractor (hereafter referred to as the 'GWC') for the installation of the materials.
5. The Company has established procedures in order to satisfy the requirements as provided in 86 Illinois Administrative Code Section 130.1951 to qualify for the 'enterprise zone building materials exemption.' Please refer to Attachment A for the specific procedures that the Company has implemented to procure the building materials.
6. The following items represent the significant materials that will be purchased from a retailer within the enterprise zone for incorporation into the facility. Please refer to Attachment B that provides a description of these items and the manner in which they are affixed to the realty. These materials will be referred to hereinafter as 'the materials:'
 - a) Two (2) utility grade combustion turbine generators and related materials
 - b) Four (4) electrical transformers
 - c) Two (2) generator circuit breakers
 - d) Above-ground and below-ground electrical cabling and piping
 - e) Power distribution buildings

Ruling Requested

1. The procedures established by the Company that are identified in Attachment A meet the requirements provided in 35 ILCS 120/5k and 86 Ill. Admin. Code Section 130.1951 in order to qualify for the sales tax deduction for the sale of building materials to be incorporated into realty within an enterprise zone.

2. The major materials identified and described in Attachment B qualify as 'building materials' for the purpose of the Retailer's Occupation Tax deduction provided in 35 ILCS 120/5k and 86 Ill. Admin. Code Section 130.1951(a)(7).

Relevant Authorities

The Illinois Retailers' Occupation Tax Act [35 ILCS 120/2] imposes a tax on persons engaged in the business of making retail sales of tangible personal property. In accordance with Section 2-10 of the Act, this tax is measured by a seller's gross receipts [35 ILCS 120/2-10]. Pursuant to Section 5k of the Act [35 ILCS 120/5k], a retailer whose place of business is located within a county or municipality which has established an enterprise zone and makes sales of 'building materials' to be incorporated into real estate within the enterprise zone by remodeling, rehabilitation or new construction, may deduct receipts from such sales in the calculation of taxable gross receipts.

In order to qualify for the exemption provided in 35 ILCS 120/5k, certain procedural and documentation requirements must be satisfied. The retailer must be located in the municipality or unincorporated area of the county that established the enterprise zone into which the building materials will be incorporated. 86 Ill. Admin. Code Section 130.1951(a)(2) provides that this requirement will be satisfied if, at the time of the sale, the retailer:

- 1) has an identifiable presence in the municipality or county that has established the enterprise zone.
- 2) is registered as a retailer at a location in the municipality of unincorporated area of the county that has established the enterprise zone.
- 3) is able to document the acceptance of purchase orders at the registered location in the municipality or the unincorporated area of the county that established the enterprise zone.

86 Ill. Admin. Code Section 1951 further provides that two separate transactions must exist independent of each other and must properly be documented. The transactions are:

- 1) a sale from the supplier to the retailer who is located in the jurisdiction that created the enterprise zone; and
- 2) a sale from the retailer who is located in the jurisdiction that created the enterprise zone to the purchaser.

The following documentation establishes a sale from a supplier to a retailer who is located in the jurisdiction that created the enterprise zone:

- 1) a purchase order issued by the retailer to the supplier;
- 2) a Certificate of Resale issued by the retailer to the supplier;
- 3) an invoice from the supplier to the retailer; and

- 4) evidence of payment to the supplier from the retailer.

The following documentation establishes a sale from the retailer who is located in the jurisdiction that created the enterprise zone to a purchaser:

- 1) a purchase order issued by the purchaser to the retailer;
- 2) an exemption certificate issued by the purchaser to the retailer certifying that the materials will be incorporated into realty within the enterprise zone;
- 3) an invoice from the retailer to the purchaser; and
- 4) evidence of payment to the retailer from the purchaser.

To meet the above requirements, the Company has established a retailer that maintains a physical presence in CITY, Illinois. As indicated in Attachment A, the retailer has established a physical presence within the CITY and will receive, accept and approve purchase orders or enter into sales contracts at that location. The retailer will purchase the significant materials that will be incorporated into realty within the enterprise zone. The retailer will resell the building materials to the Company who will contract for the installation and erection of the materials with the GWC.

The facts indicate that the procedures established by the Company, and provided in Attachment A, satisfy the requirements set forth in 86 Ill. Admin. Code Section 130.1951. Therefore, the captive retailer may make tax-free sales of qualifying building materials that will be incorporated into realty within the CITY Enterprise Zone.

In order to qualify for the deduction as provided in 35 ILCS 120/5k, the materials must constitute 'building materials' as provided in 86 Ill. Adm. Code Sec. 130.1951(a)(7).

86 Ill. Admin. Code Sec. 130.1951(a)(7) provides:

In order to qualify for the deduction, the materials being purchased must be building materials. That is, they must be purchased for *physical incorporation* into real estate. (Emphasis added)

Therefore, the question is whether the materials described in Attachment B will qualify as 'building materials,' that is, whether the materials are purchased for 'physical incorporation into real estate.'

The Department in Private Letter Ruling 99-0009 (March 9, 1999) ruled that pipe racks, pipe, supports, and piping tie-ins installed at a natural gas fired power plant would constitute 'building materials' under the Department's regulations because they were permanently affixed to real estate. Further, since the real estate was located within an enterprise zone such items incorporated into real estate could be purchased tax-free from qualified retailers.

In a more recent decision, the Department in Private Letter Ruling ST 00-0013 (July 7, 2000) found that certain materials incorporated into realty within an electricity

generating facility qualified as a building material pursuant to the Department's regulations. The Department found that turbine generators, electrical transformers, electrical cabling, piping and other materials that are permanently affixed to real estate qualify as a 'building material' for purposes of the deduction provided in 35 ILCS 120/5k and 86 Ill. Admin. Code Sec. 1951(a)(1).

The facts and issues stated in ST 00-0013 are virtually identical to the issues at hand in this letter ruling request. The materials at issue here will be permanently and physically attached to the realty. Please refer to Attachment B for details on the method of affixation. Removal of the materials after affixation, including the combustion turbine generators, would result in substantial damage to the materials and realty. The anchor bolts, which are embedded in the concrete foundation, would have to be removed. Removing the anchor bolts would cause damage to the anchor bolts, the foundation, the underground electrical cable and piping, and possibly cause damage to the combustion turbine generator itself. Therefore, this demonstrates that the equipment, after being attached, is permanently affixed.

Conclusions

35 ILCS 120/k provides that a retailer whose place of business is located within a county or municipality which has established an enterprise zone, and who makes sales of 'building materials' to be incorporated into real estate in that enterprise zone by remodeling, rehabilitation or new construction, may deduct receipts from such sales in the calculation of taxable gross receipts.

The deduction provided in 35 ILCS 120/5k is applicable to receipts from the sales of 'building materials.' In order to qualify as 'building materials,' the items must be physically incorporated into real estate.

The materials in question qualify as 'building materials' for purposes of the deduction provided in 35 ILCS 120/5k. The materials are physically and permanently incorporated into realty as described in Attachment B. Therefore, since the materials qualify as building material and are incorporated into realty within an enterprise zone, the materials may be purchased from a qualifying retailer free from Retailer's Occupation Tax and Use Tax.

We respectfully request that the Department issue a ruling stating that the procedures outlined in the Attachments A satisfy the Department's regulations found at 86 Ill. Admin. Code Section 130.1951 to qualify for the Enterprise Zone deduction and that the materials described in Attachment B qualify as 'building materials' for the purposes of the deduction provided in 35 ILCS 120/5k.

If the Department can not conclude that the procedures outlined above conform to the Department's regulations or that the materials qualify as 'building materials,' I request the Department contact me at ##### to determine what additional information is required to allow the taxpayer to rescind this ruling request.

Enclosed is a copy of 86 Ill. Adm. Code 130.1951 concerning Enterprise Zones. The enterprise zone building materials exemption allows retailers located in the municipality or unincorporated area of a county that established an enterprise zone to make tax-free sales of building materials that will be incorporated into real estate located in the enterprise zone. In order for businesses to qualify for the exemption as retailers, they must comply with the following requirements:

1. Retailers must have an identifiable physical presence in the municipality or the county that has established the enterprise zone;
2. Retailers must register with the Department as a retailer at a location in the municipality or in the unincorporated area of the county that has established the enterprise zone;
3. Retailers must be able to document the acceptance of purchase orders at a location in the municipality or the county that has established the enterprise zone.

In order for the enterprise zone building materials exemption to be claimed, it must be shown that qualifying building materials were purchased from a retailer located in the jurisdiction that created the enterprise zone into which the building materials will be incorporated. It is critical that a clear paperwork trail exists showing that buyers purchased the materials from qualified retailers. In general, the following two transactions must exist:

1. Sales from suppliers to retailers who are located in the jurisdiction that created the enterprise zone (exempt as sales for resale); and
2. Sales from retailers who are located in the jurisdiction that created the enterprise zone to buyers (exempt by reason of the enterprise zone building materials exemption).

Each of these transactions must exist independent of the other and the exemption applicable to each transaction must be documented. We urge taxpayers not to be cavalier in structuring these transactions. Generally, the following documentation establishes the two transactions and the available exemptions:

1. Sales from suppliers to retailers:
 - a. Purchase orders from retailers to the suppliers;
 - b. Certificates of Resale from retailers to suppliers (see the enclosed copy of 86 Ill. Adm. Code 130.1405, which describes the requirements for Certificates of Resale);
 - c. Invoices from suppliers to retailers; and

- d. Payments to suppliers from retailers.
- 2. Sales from retailers to purchasers:
 - a. Purchase orders from purchasers to the retailers;
 - b. Enterprise zone building materials certifications from purchasers to retailers containing all of the information set forth at 86 Ill. Adm. Code 130.1951(a)(6);
 - c. Invoices from retailers to purchasers; and
 - d. Payments to retailers from purchasers.

There is no requirement that the materials be physically received at the retailer's location.

Under the scenario you set forth, you have indicated that the retailer will have an identifiable physical presence in the municipality or the county that has established the enterprise zone. You have also indicated that the retailer is registered with the Department as a retailer at a location in the municipality or in the unincorporated area of the county that has established the enterprise zone. Further, you have indicated that the retailer will be able to document the acceptance of purchase orders at a location in the municipality or the county that has established the enterprise zone.

Your letter indicated that a clear paperwork trail would exist showing that suppliers sold the materials to qualified retailers who then resold them to the COMPANY. Your letter also stated that the retailer will issue a Certificate of Resale to the material supplier and that the material supplier will invoice the retailer who would make payment to the material supplier. The retailer will, in turn, issue a bill of sale to COMPANY. COMPANY will provide a properly executed exemption certificate to the retailer certifying that qualifying materials will be incorporated into realty within the enterprise zone and will pay the amount of the invoice to the retailer. The fact that the retailer acquired a right to purchase the combustion turbine generators and transformers from an affiliate of COMPANY has no bearing on the outcome of this analysis. Sales of the building materials made in compliance with the scenario set forth in your letter will qualify for the enterprise zone exemption.

In the next part of the analysis we must determine whether the items being incorporated are building materials as defined in the regulations. Section 130.1951(a) states, in part, as follows:

- 7) In order to qualify for the deduction, the materials being purchased must be building materials. That is, they must be purchased for physical incorporation into real estate.

The gas combustion turbines that are constructed on site and permanently affixed to the foundation qualify as building materials. It is the Department's understanding that such turbines are physically attached to a steel reinforced concrete foundation with anchor bolts and hardwired to underground and above ground electrical cabling and natural gas and water supply piping. The generator that is constructed on-site and permanently affixed to the foundation with anchor bolts and connected to underground and electrical cabling qualifies as a building material. The stack, which is

attached to the concrete foundation with anchor bolts and welded together, qualifies as a building material. The air inlet system attached to a foundation constructed on top of the generator foundation with anchor bolts and hardwired into underground and aboveground cabling and piping for water supply, also qualifies as a building material.

In regards to the electrical equipment, the transformers that are attached with anchor bolts to a reinforced steel concrete foundation qualify as building materials. The generator circuit breakers that are attached to concrete footing by anchor bolts qualify as building materials. The underground cabling that is housed in conduit and encased in a concrete housing "duct bank" and is run 4 to 10 feet below the ground, qualifies as a building material. The aboveground electrical bus duct and cabling that is physically attached to "T" supports, which are attached to the foundation by anchor bolts, also qualifies as a building material.

The piping that is installed 4 to 10 feet below the ground and is encased in concrete qualifies as a building material. The aboveground piping that is welded to equipment supports that are attached to the foundation qualifies as a building material.

The power distribution buildings that are prefabricated and attached to a concrete foundation with anchor bolts qualify as building materials. The equipment housed in such buildings that is physically attached by bolts to supports and racks built into the building also qualify as building materials. The racks and supports to which such equipment is attached also qualify as building materials because they are physically attached to the building with bolts.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.